SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 912

FRED TOYOSABURO KOREMATSU

vs.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

323453—43

1 United States Circuit Court of Appeals for the Ninth Circuit

No. 10248

FRED TOYOSABURO KOREMATSU, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION

Certificate to the Supreme Court of the United States of questions of law upon which the Circuit Court of Appeals for the Ninth Circuit desires instruction for the proper decision of a cause

To the Honorable the Chief Justice and the Justices of the Supreme Court of the United States:

Statement of facts

This cause began in an information filed by the United States Attorney for the Northern District of California in the United States District Court for that district. The information reads.

"Leave of Court being first had, Frank J. Hennessy, United States Attorney for said District, comes, and for the United States of America informs this Court: that Fred Toyosaburo Korematsu (hereinafter called 'said defendant'), being at all the times herein mentioned a person of Japanese ancestry, and being within the geographical limits of Military Area No.

2 1 as said Area is defined and described in Proclamation No. 1, dated March 2, 1942, issued by J. L. DeWitt, Commanding General, Western Defense Command, and Military Commander designated by the Secretary of War, pursuant to Executive Order No. 9066 of the President of the United States, dated February 19, 1942, did, on or about the 30th day of May 1942, at the City of San Leandro, County of Alameda, State of California, within said division and district, and within the geographical limits of Area No. 1, unlawfully, willfully and knowingly commit an act contrary to the order of the Secretary of War and of such Military Commander, in that he, the said defendant, was, at said time and place, and did, at said time and place, remain in that portion of Military Area No. 1

covered by Civilian Exclusion Order No. 34 of said Commanding General, J. L. DeWitt, issued on May 3, 1942, in which all persons of Japanese ancestry are excluded from, and not permitted to remain in, the said City of San Leandro, County of Alameda, State of California, after 12 o'clock, noon, P. W. T. May 9, 1942; that at said time said defendant knew of the existence of said restrictions and order, and that his said act was in violation thereof."

Jury was waived and Korematsu was tried and found guilty by the district court. The court, on September 8, 1942, made its order that

"* * * the defendant, Fred Toyosaburo Korematsu, be placed on probation for the period of five (5) years, the terms and conditions of the probation to be stated to said defendant by the Probation Officer of this Court. Further ordered that the bond heretofore given for the appearance of the defendant be exonerated. Ordered pronouncing of judgment be suspended."

Appellant appealed from the order to this court, an appeal duly taken if we have the jurisdiction to consider it.

Thereafter, on December 23rd and December 29th,
3 1942, appellant moved in the district court "that sentence now be passed upon him." The district court found that "no request was made for the imposition of sentence at the time of trial." The record shows no request of appellant to be placed on probation. The district court denied the motion to impose sentence.

Appellee raises the question whether an order so imposing probation is a "final decision" of the district court within the jurisdiction of our review provided in section 128 of the Judicial Code, 28 U. S. C. A. 225.[1]

We are confronted with decisions of two circuits, the Second and Fifth, holding opposing views as to the appealability of such an order.

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[1] § 225. (Judicial Code, section 128.) Appellate jurisdiction.

(a) Review of final decisions.—The circuit courts of appeal shall have appellate jurisdiction to review by appeal final decisions—

First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 345 of this title.

* * * * *

The Second Circuit holds not appealable an order for probation without a sentence for a time period. It considered its character and dismissed the appeal. United States v. Lecato, 29 F. (2d) 694, 695. The Fifth Circuit considered such an appeal and affirmed the order. Cooper v. United States, 91 F. (2d) 195, 199.

4 The opinions show the divergence between the two circuits. In the Second Circuit case the convicted man had not demanded a specific sentence for a term of imprisonment. The opinion states,

"The appeal from the suspension of sentence was premature. The only judgment in a criminal prosecution is the sentence, and when sentence is suspended there is no judgment from which to appeal. This has been substantially the uniform ruling whenever the question has arisen, in the absence of some statute allowing an appeal. * * *

"* * * Nor is there any serious injustice involved; a defendant may at any time insist upon the imposition of sentence, if so minded, and if he prefers to remain under probation rather than to take his chances, no grave evil results. At any rate, if it be thought desirable that he should have an appeal, the law is too well settled for us to change it." United States v. Lecato, 29 F. (2d) 694,695.

In the Fifth Circuit the convicted men, Will and Johnny Cooper, demanded such sentences. The district court refused to impose them but instead ordered probation. On appeal, the court affirmed the order, treating probation as a punishment which the court could order despite demand for the usual sentence. Its opinion states that probation

"* * * is an authorized mode of mild and ambulatory punishment, the probation being intended as a reforming discipline. The probationer is not a free man, but is subject to surveillance, and to such restrictions as the court may impose. We do not agree with appellants' contention that probation, like pardon, may be refused by the convicted person. The

5 act vests a discretion in the Court, not a choice in the convict. The probation here imposed is rather loose and informal, but is authorized by the act.

"The judgment is accordingly affirmed as to Will Cooper and Johnny Cooper, * * *." Cooper v. United States, 91 F. (2d) 195,199.

In neither case was certiorari applied for. The conflict in the circuits, one dismissing and the other affirming the appeal, not only would be heightened by our decision but would subject the appellant, now under the restraint of the probation order and demanding an immediate sentence of imprisonment or fine, to the delay and expense of petitioning for certiorari, most likely to be granted under Supreme Court Rule 38, paragraph 5 (a). Appellant well may find a decision on certiorari postponed until the October Term of the Supreme Court.

This Court, sitting en banc, is in grave doubt concerning our jurisdiction to consider the order and certifies to the Supreme Court of the United States the following question of law, concerning which instruction is desired for the proper decision of the cause:

Question certified

(1) After a finding of guilt in such a criminal proceeding as the instant case, in which neither imprisonment in a jail or penitentiary nor a fine is imposed, is an order by the district
6 court, that the convicted man "be placed on probation for the period of five (5) years," a final decision reviewable on appeal by this circuit court of appeals?

CURTIS D. WILBUR,
United States Circuit Judge.
FRANCIS A. GARRECHT,
United States Circuit Judge.
WILLIAM DENMAN,
United States Circuit Judge.
BERT EMORY HANEY,
United States Circuit Judge.
ALBERT LEE STEPHENS,
United States Circuit Judge.
WILLIAM HEALY,
United States Circuit Judge.

[Clerk's certificate omitted.]

[Endorsement on cover:] File No. 47413. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 912. Fred Toyosaburo Korematsu, vs. The United States of America. Certificate. Filed April 12, 1943. Term No. 912 O. T. 1942.

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